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FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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In the Matter of

Usage of the Public Switched  
Network by Information Service  
and Internet Access Providers

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CC Docket No. 96-263

REPLY COMMENTS OF THE  
UNITED STATES TELEPHONE ASSOCIATION

UNITED STATES TELEPHONE ASSOCIATION

By Its Attorneys:

Mary McDermott  
Linda Kent  
Keith Townsend  
Hance Haney

U.S. Telephone Association  
1401 H Street, N.W.  
Suite 600  
Washington, D.C. 20005  
(202) 326-7249

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## SUMMARY

The record in this proceeding demonstrates that there is broad support for the principle that Internet service providers should recover the interstate network costs they incur. In light of the fact the FCC is expected to significantly restructure access charges, removal of the ESP exemption is necessary and appropriate at this time. The Commission's current pricing policies do not encourage efficient investment.

In moving to pricing that is based on cost-causative principles, it would be inappropriate for the Commission to employ TELRIC, which would not allow LECs to recover all legitimate costs.

The Commission should establish the principle that interstate network users—including Internet service providers—should pay based upon their use of the network. Users that incur network costs in similar ways should be charged on the same basis. A negotiated rulemaking should be conducted which focuses on developing a market-based, flexible means of pricing access to the public network by Internet service providers and similar users. The Commission should also prevent competitive local exchange carriers that serve information service providers from attempting to obtain significant termination revenues for inbound interstate traffic to these providers by claiming that these are local calls.

Action by the Commission at this time is warranted since several local exchange carriers (LECs) have demonstrated that they are making significant unplanned investments to increase the capacity of the circuit switched network to accommodate increased Internet traffic and since there are insufficient incentives for investment in "data-friendly" packet technology.

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UNITED STATES TELEPHONE ASSOCIATION**

The United States Telephone Association ("USTA") respectfully replies to comments filed on March 23, 1997 in the above-referenced proceeding.

**I. INTRODUCTION**

As traffic from Internet usage has grown, USTA members have taken successful action to prevent degradations in service quality on the public switched network. In their individual filings, several USTA members have shown that these measures have been costly and, due to the Commission's current pricing policies, have principally been aimed at increasing the capacity of the existing circuit-switched network. Since Internet use is expected to continue to grow, it is essential for the Commission to reform its present pricing policies for access to LEC networks in order to provide the right incentives for efficient network investment and

development. Given the innately interstate and international nature of Internet traffic, these issues are squarely within the Commission's jurisdiction.

The record in this proceeding demonstrates that the Commission's current pricing policies do not encourage efficient investment and that there is a recognition among IXC's, ISPs and LECs that Internet access to LECs' networks should be priced according to cost-causative principles. In moving to pricing that is based on cost-causative principles, it would be inappropriate for the Commission to employ TELRIC, as some commenters suggest. TELRIC would not allow LECs to recover all of their costs. Rather, in keeping with efforts to replace the existing access charge regime with a market-based access framework, the Commission should adopt the principle that network users should pay market-based rates to recover the interstate network costs they incur. A key aspect of moving to cost-based pricing must be the elimination of competitive advantage due to regulation. The Commission should act on the NOI quickly and move to a negotiated rulemaking to achieve these goals.

**II. THERE IS BROAD SUPPORT FOR THE PRINCIPLE THAT INTERNET SERVICE PROVIDERS SHOULD PAY FOR ACCESS TO AND USE OF LECs' NETWORKS IN ORDER TO RECOVER THE NETWORK COSTS THEY INCUR**

The comments filed in this proceeding demonstrate that there is broad support, amongst ISPs, IXC's and LECs, for the principle that network users should recover the interstate network costs they incur.<sup>1</sup> Other parties such as the Commercial Internet Exchange

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<sup>1</sup> See AT&T Corp. at 25; Bell Atlantic and NYNEX at 16; Cincinnati Bell at 5-6; Competitive Telecommunications Association ("CompTel") at 2; CompuServe, Inc. and Prodigy Services Corp. at 12; GTE at 2; Internet Access Coalition ("IAC") at 41-42; Internet

Association ("CIX") and the United States Internet Providers Association ("USIPA"), recognize that network upgrades may entail costs that are unrecoverable under the Commission's current pricing rules and, as a result, are willing to work with LECs to resolve these problems.<sup>2</sup> USTA welcomes these initiatives.

USTA continues to agree with the Commission's tentative conclusion that information service providers should not pay access charges as currently constituted. However, the FCC is expected to significantly restructure access charges in the coming months. USTA agrees with MCI that "a re-evaluation of the policy regarding ESPs is appropriate and consistent with the original basis for the exemption."<sup>3</sup>

Likewise, USTA agrees with AT&T that "It is increasingly clear that perpetuation of the access charge exemption to ESPs causes greater public harm -- in the form of market distortions that send the wrong economic signals to network suppliers, network customers, and end users -- than benefit."<sup>4</sup> The incorrect economic signals AT&T refers to are already are manifesting themselves in the investment decisions of LECs and ISPs alike. As discussed in Section V below, current investment is overwhelmingly aimed at circuit-switched technologies rather than "data-friendly" packet technologies. AT&T accurately concludes that "sound

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User Coalition ("IUC") at 12; MCI Communications Corp. at 6; Pacific Telesis at 16-17; Southern New England Telephone Company ("SNET") at 9; Southwestern Bell at 3; USTA at 4; U S WEST at 29; WorldCom at 13.

<sup>2</sup> See CIX at 13; USIPA at 13-14.

<sup>3</sup> Comments of MCI at 2.

<sup>4</sup> AT&T at 4.

economic and regulatory principles will require that *all* users of those services pay the same prices for those access services, regardless of the nature of the communications being transmitted.”<sup>5</sup>

III. AS USTA HAS SHOWN, TELRIC IS NOT AN APPROPRIATE COST METHODOLOGY BECAUSE IT DOES NOT ALLOW A LEC TO RECOVER ITS ACTUAL COSTS

In moving to market-based pricing for LEC networks, it would be inappropriate to employ TELRIC as some commenters have suggested. On behalf of USTA, J. Gregory Sidak and Daniel F. Spulber have shown that TELRIC would not allow an incumbent LEC to recover all of its legitimate costs, since *all* of a LEC’s shared and common costs would be excluded:

“Because TELRIC pricing fails to recover any of the incumbent LEC’s shared costs or common costs, it interferes with the incumbent LEC’s opportunity to earn a fair rate of return on its investment or even to recover its investment. That outcome violates section 252(d)(3), added to the Telecommunications Act in 1996 [footnote omitted], which calls for the firm to recover its costs, with pricing that may include a reasonable profit. TELRIC pricing *guarantees* losses and thus is inherently confiscatory. A policy that required TELRIC pricing would therefore violate section 252(d)(3) and constitute a taking. A firm that does not cover its common costs and shared costs will not remain in business for very long.”<sup>6</sup>

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<sup>5</sup> *Id.* at 6.

<sup>6</sup> Affidavit of J. Gregory Sidak and Daniel F. Spulber, CC Docket No. 96-263 (filed Mar. 24, 1996) (“Sidak/Spulber Affidavit”) at 44.

USTA has repeatedly demonstrated that TELRIC and related cost methodologies do not allow a LEC to recover its total costs<sup>7</sup> and has further pointed out that, as a result, TELRIC thwarts large network investments by incumbent LECs and discourages competitors from entering on a facilities basis.<sup>8</sup>

#### IV. REFORM OF THE ACCESS CHARGE RULES SHOULD INCLUDE REFORM OF LECs' CHARGES FOR INFORMATION SERVICE PROVIDERS

Under the Commission's current pricing policies, Internet service providers pay flat rates for services that have both fixed and usage sensitive cost components. USTA agrees with MCI that "the current access charge exemption for ESPs creates incentives for arbitrage, which will ultimately lead to inefficient use of the network."<sup>9</sup> As USTA has shown, this policy sends incorrect signals for investment and innovation:

"Accurate price signals are necessary not only for consumers to make efficient decisions, but also to provide investment incentives for suppliers of capacity. The combination of flat-rate pricing for local access and zero access charges for ISPs fails to provide efficient investment incentives for incumbent LECs and for CLECs. Incumbent LEC investment is discouraged because zero access prices

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<sup>7</sup> See, e.g. Comments of USTA, CC Docket No. 96-98 (filed May 16, 1996) at 45-46; Reply Comments of USTA, CC Docket No. 96-98 (filed May 30, 1996) at 18-27; Comments of USTA, CC Docket No. 96-262 (filed January 29, 1997) at 13-16; and Reply Comments of USTA, CC Docket No. 96-262 (filed February 14, 1997) ("Access Reform Reply Comments of USTA") at 13-14.

<sup>8</sup> Access Reform Reply Comments of USTA at 6 (citing Statement of Alfred E. Kahn on FCC's Proposed Reform of Carrier Access Charges).

<sup>9</sup> MCI at 4-5.



certainly do not allow cost recovery. CLEC creation of bypass alternatives is discouraged as well because it is hard for any firm to compete with a free ride.”<sup>10</sup>

A. The Commission Should Establish a Market-Based Compensation Principle and Determine How To Apply It Expeditiously Through A Negotiated Rulemaking Building Upon This NOI

The Commission should establish in the Access Reform proceeding the principle that interstate network users—including Internet service providers—should pay based upon their use of the network. Users that incur network costs in similar ways should be charged on the same basis. A negotiated rulemaking should be conducted which focuses on developing a market-based, flexible means of pricing access to the public network by Internet service providers and similar users. Pricing flexibility ought to include, for example, contract pricing that allows term and volume discounts<sup>11</sup> and permits new services to be introduced outside of price caps.<sup>12</sup> Pending such a rulemaking, USTA stands ready to dialogue with all interested parties concerning these issues.<sup>13</sup>

The adoption of a market-based compensation principle will not halt the growth of Internet services. USTA disagrees with dire predictions concerning the effects of any increase

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<sup>10</sup> Sidak/Spulber Affidavit at 31, para. 81.

<sup>11</sup> See *Pacific Telesis* at 16.

<sup>12</sup> See *Southwestern Bell* at 3.

<sup>13</sup> USTA notes that CIX encourages a dialogue “in order to better understand the problems facing all parties.” CIX at 15.

in the fees imposed upon Internet service providers.<sup>14</sup> As shown by Pacific Telesis, the imposition of market-based rates would not have a significant impact on the vast majority of end users.<sup>15</sup> There is no reason to believe that the adoption of a market-based compensation principle will lead to excessive access prices for ISPs. As a general matter, the presence of competitive access alternatives will prevent excessive prices for access to Internet service providers.<sup>16</sup>

The pricing of Internet access clearly falls within the Commission's jurisdiction. As AT&T observes, "It cannot be seriously questioned that the vast majority of ESPs' Internet and online services overwhelmingly involve interstate traffic which falls squarely within the Commission's jurisdiction."<sup>17</sup> This conclusion is not seriously disputed. To the extent that it

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<sup>14</sup> See, e.g., IUC at 14 ("It is no exaggeration to state that [new fees] would impact the very nature of the modern democratic process - the freedom and ability of citizens to speak.").

<sup>15</sup> See Pacific Telesis at 6 ("assuming a hypothetical access charge of 1.0 cent per MOU (fully passed through to the end user by the ISP), about 80% of end users would face price increases of less than \$5.00 per month"). See also Sidak/Spulber Affidavit at 41 ("The burgeoning information transmission will continue apace, driven by advances in computers and communications technology, and the accompanying developments in software, communications protocols, and commercial, educational, medical, entertainment, and other applications").

<sup>16</sup> See Sidak/Spulber Affidavit at 40-41 ("The Commission should dismiss concerns that removing the ESP exemption will create excessive prices for access to ISPs").

<sup>17</sup> AT&T at 29-30. See also CAIS at 13 ("Internet services are inherently interstate and increasingly international"); Internet Consumer Parties at 15 ("The very foundation of the Internet is national, and indeed global, in nature"); and IUC at 6 ("Global Network of Networks"). A recently-introduced bill pending before the United States Senate entitled the "Internet Tax Freedom Act" (S. 442) contains statements of finding which buttress this conclusion: "(1) As a massive global network spanning not only State but international borders, the Internet is inherently a matter of interstate and foreign commerce within the jurisdiction of the United States Congress under Article I, Section 8 of the United States Constitution. (2) Even within the United States, the Internet does not respect State lines and

may be difficult to distinguish between interstate versus intrastate transmissions for pricing purposes, several solutions have been suggested. These options include the application of the Commission's "10 percent rule" for Special Access<sup>18</sup> or the adoption of a rebuttable presumption that access services provided to an ESP are entirely subject to the Commission's jurisdiction because of their interstate character."<sup>19</sup>

**B. CAPs And CLECs Are Not Entitled To Termination Revenues For The Inbound Traffic Generated By ISPs Which Is Interstate In Nature**

A key aspect of moving to market-based pricing must be the elimination of competitive advantage due to regulation. At present, competitive local exchange carriers that provide serving wire center service to major information service providers may attempt to obtain significant termination revenues for inbound interstate traffic to these providers by claiming that these are local calls. USIPA confirms that ISPs have been able to obtain rates for local services from CAPs and CLECs "at levels significantly below ILEC pricing."<sup>20</sup> According to SNET, several CAPs in Connecticut are offering free co-location of equipment as well as free or deeply discounted line rates based simply on the profit the a CAP will derive from

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operates independently of State boundaries. Addresses on the Internet are designed to be geographically indifferent. Internet transmissions are insensitive to physical distance and can have multiple geographical addresses."

<sup>18</sup> Bell Atlantic and NYNEX at 14; Southwestern Bell at 12.

<sup>19</sup> AT&T at 28.

<sup>20</sup> USIPA at 11-12.

payments by ILECs under the Commission's mutual compensation rules as a reward for ISPs to move their terminating traffic from the ILEC network to the CAP network. SNET estimates that it could be liable for payments of millions of dollars per year if the Commission permits this practice to continue.<sup>21</sup> To the extent that a portion of these payments are passed along to ISPs in the form of lower prices and free installation, the Commission's reciprocal compensation rules constitute a subsidy of the Internet industry separate and apart from the ESP exemption. As Bell Atlantic and NYNEX have observed, under the Commission's rules, interstate and intrastate interexchange traffic are not eligible for reciprocal compensation.<sup>22</sup> Consequently, since the calls in question are interstate, jointly provided meet point billing rules should apply.<sup>23</sup>

V. THERE ARE COMPELLING REASONS FOR COMMISSION ACTION AT THIS TIME

Several USTA members have demonstrated in their individual filings the substantial costs they have incurred in modifying their networks to accommodate burgeoning Internet traffic. For example, SNET reports it added 3,260 new trunks within the past 12 months that can be directly attributed to ISP demand, at a cost of \$3 million for switching and transport

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<sup>21</sup> See SNET at 10.

<sup>22</sup> Bell Atlantic and NYNEX at 14 (citing First Report and Order, CC Docket No. 96-98, FCC 96-325 (rel. Aug. 8, 1996) at para. 1034.

<sup>23</sup> USTA at 21-22.

facilities and an associated labor cost of \$150,000.<sup>24</sup> SNET projects that if 25% of its customers were to exhibit typical Internet subscriber usage patterns, the company would be required to invest in excess of \$500 million build out the PSTN to carry data traffic.<sup>25</sup> GTE has spent between \$50.3 million and \$83.6 million thus far as a direct result of increased ISP traffic and estimates that it could expend this much in 1997 alone.<sup>26</sup> Southwestern Bell projects that it will spend at least \$600 million within the next 5 years, and that while second lines do generate additional revenues for the company, the additional revenues are primarily generated from vertical services and state long distance, not from the basic second line service.<sup>27</sup> Pacific Bell anticipates that it will spend over \$300 million to support ISP traffic over the next 5 years, but will generate about \$150 million in incremental revenue from ISPs.<sup>28</sup> U S WEST conservatively estimates that \$33 million will be needed in 1997 to provision ESPs, and that by the year 2001 its capital requirement will climb to somewhere between \$72 million and \$246 million, depending on the mix of line side versus trunk side connections.<sup>29</sup> Meanwhile, Bell Atlantic spent nearly \$200 million above its planned network construction budget in 1996, and this figure is expected to exceed \$300 million in 1997.<sup>30</sup> Bell

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<sup>24</sup> SNET at 14.

<sup>25</sup> *See id.*, at 20.

<sup>26</sup> GTE at 22.

<sup>27</sup> Southwestern Bell at 11.

<sup>28</sup> Pacific Telesis at 30-31.

<sup>29</sup> U S WEST Exhibit A at 11.

<sup>30</sup> Bell Atlantic and NYNEX at 6.

Atlantic adds that “at the present rate of growth, Internet minutes could overtake minutes from interexchange carriers in just a few years.”<sup>31</sup> Likewise, Sprint reports that it has experienced two major congestion problems that can be attributed to Internet access, and that it has spent between \$350,000 to \$400,000 on each occasion to add interoffice trunks.<sup>32</sup> The necessity of network upgrades due to growing Internet use, and their associated costs, as reported to date, is undisputed.

As these projections indicate, LECs expect to incur substantial additional costs due to the fact that Internet traffic is expected to grow. This assumption is supported by the comments of ISPs: USIPA reports that “All expectations are that Internet services will grow even more rapidly in the future,”<sup>33</sup> a sentiment echoed by CIX: “All segments of the ISP industry -- from the very small to the large businesses -- expect at least a 100% increase in the growth of Internet services using “dial-up” connections.”<sup>34</sup>

The Commission has recognized that circuit switches are inefficient when used to connect an end-user to the Internet<sup>35</sup> and America Online (“AOL”) states that “It is clear that the migration of data traffic from the existing voice-oriented circuit-switched telephone network is crucial.”<sup>36</sup> Nevertheless the Commission’s current pricing policies, under which

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<sup>31</sup> *Id.* at 9.

<sup>32</sup> Sprint at 5.

<sup>33</sup> USIPA at 3.

<sup>34</sup> CIX at 7.

<sup>35</sup> NOI at 138, para. 313.

<sup>36</sup> AOL at 16.

ISPs pay below-cost rates will actually retard the development of data-friendly networks.

AT&T is correct when it states that "Continued below-cost pricing of ILEC network facilities for some users subsidized by higher prices for others will make it *less* likely -- not more likely -- that the efficient packet-switched networks of the future will be built."<sup>37</sup> Bell Atlantic has found that none of the large ISPs -- those that cause most of the network congestion -- has subscribed to Bell Atlantic's new packet-based Internet access service, preferring instead simply to order more local business lines.<sup>38</sup> According to Sidak and Spulber,

"The ESP exemption interferes with market incentives for efficient matching of buyers and sellers. Because data are better handled on packet-switched networks, a free ride for ISPs on the PSTN reduces incentives for matching data users with the best access alternatives. ISP customers have greatly reduced incentives to seek out access alternatives. Some users who are concerned about congestion or about the speed of transmission on the PSTN will seek out other solutions ... and leave lower value users on the PSTN. Regulatory price controls such as the ESP exemption deprive the LEC of incentives to upgrade its networks to serve data users with specially tailored services; moreover, such controls create incumbent burdens that impede the LEC's competition with ISPs. What should instead emerge is a menu of access alternatives with different price-quality alternatives. The ESP exemption delays market innovation by offering ISPs an enticing free ride."<sup>39</sup>

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<sup>37</sup> AT&T at 18. *See also* Alliance for Public Technology at 5 ("ISPs have little incentive to move to other local network solutions, and local telephone companies, as a result, may not have the incentive to deploy them"); America's Carriers Telecommunications Association ("ACTA") at 3 ("If ISPs are allowed to use the existing circuit-switched PSTN without having to pay for the proportionate costs they incur, no natural market incentives to build Internet access networks that circumvent the incumbent local exchange carriers ("ILECs") will exist").

<sup>38</sup> *See* Bell Atlantic and NYNEX at 13.

<sup>39</sup> Sidak/Spulber Affidavit at 32.

This conclusion is reinforced by the observation of CIX that “ISPs will purchase data-efficient access or connection arrangements when they become available and when it is economically reasonable to do so .... However, the Commission should understand that ISPs with significant equipment investments would prefer to maximize use of their investment.”<sup>40</sup> Commenters have not demonstrated—nor could they—that artificially low prices for access to the circuit-switched network will promote the deployment of more data-friendly technologies.

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<sup>40</sup> CIX at 14.



## VII. CONCLUSION

There is ample recognition that the Commission's present pricing policies do not recover the costs incurred by LECs' from meeting the requirements of the burgeoning Internet service provider industry. Therefore, reform of the access charge framework should include reform of LECs' charges for Internet service providers and similarly situated access customers. The Commission should establish a market-based compensation principle and determine how to apply it expeditiously through a fast-track rulemaking proceeding or a negotiated rulemaking building upon this NOI. As part of the move to market-based pricing, the Commission should eliminate competitive advantages due to regulation. Absent reform, the magnitude of the problems identified in this proceeding will increase.

Respectfully submitted,

UNITED STATES TELEPHONE ASSOCIATION

By: Hance Haney

Mary McDermott  
Linda Kent  
Keith Townsend  
Hance Haney

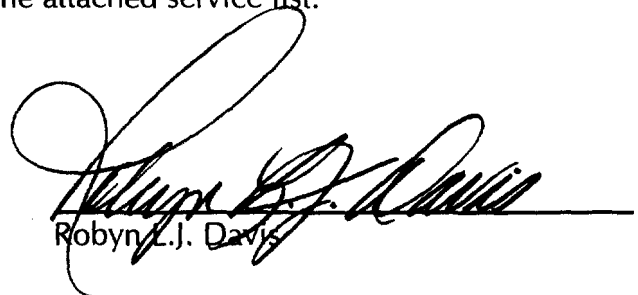
Its Attorneys

U.S. Telephone Association  
1401 H Street, N.W.  
Suite 600  
Washington, D.C. 20005  
(202) 326-7249

April 23, 1997

**CERTIFICATE OF SERVICE**

I, Robyn L.J. Davis, do certify that on April 23, 1997 reply comments of the United States Telephone Association were either hand-delivered, or deposited in the U.S. Mail, first-class, postage prepaid to the persons on the attached service list.



Robyn L.J. Davis

Charles H. Helein  
Robert M. McDowell  
Brian A. Cute  
Helein & Associates, PC  
8180 Greensboro Drive - Suite 700  
McLean, VA 22102

Mark C. Rosenblum  
Ava B. Kleinman  
AT&T  
295 North Maple Avenue  
Basking Ridge, NJ 07920

William W. Burrington  
Jill A. Lesser  
America Online, Inc.  
1101 Connecticut Avenue, NW  
Suite 400  
Washington, DC 20036

Dennis C. Hayes  
Hayes Microcomputer Products, Inc.  
5953 Peachtree Industrial Blvd  
Norcross, GA 30092

David P. McClure  
Association of Online Professionals  
6096 Franconia Road - Suite D  
Alexandria, VA 22310

Joseph DiBella  
Bell Atlantic and NYNEX  
1300 I Street, NW - Suite 400 West  
Washington, DC 20005

Glenn B. Manishin  
Michael D. Specht  
Blumenfeld & Cohen  
1615 M Street, NW  
Suite 700  
Washington, DC 20036

Albert H. Kramer  
Robert F. Aldrich  
David M. Janas  
Dickstein Shapiro Morin & Oshinsky LLP  
2102 L Street, NW  
Washington, DC 20037

Gene C. Schaerr  
James P. Young  
AT&T  
1722 Eye Street, NW  
Washington, DC 20006

Donna N. Lampert  
Christopher J. Harvie  
Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, PC  
701 Pennsylvania Avenue, NW  
Suite 900  
Washington, DC 20004

Steven P. Klinger  
Clark Development Company, Inc.  
3950 South 700 East - Suite 303  
Murray, Ut 84107

Edward D. Young, III  
Betsy L. Anderson  
Lawrence W. Katz  
Bell Atlantic and NYNEX  
1320 North Court House Road - Eighth Floor  
Arlington, VA 22201

M. Robert Sutherland  
Richard M. Sbaratta  
BellSouth  
1155 Peachtree Street, NE  
Suite 1700  
Atlanta, GA 30309

Mark Meitzen  
Christensen Associates  
4610 University Avenue  
Suite 700  
Madison, WI 53705

Christopher L. Wilson  
Frost & Jacobs LLP  
2500 PNC Center  
201 East Fifth Street  
Cincinnati, OH 45202

Thomas E. Taylor  
Cincinnati Bell Telephone Co.  
201 East Fourth Street  
Sixth Floor  
Cincinnati, OH 45202

Genevieve Morelli  
Competitive Telecommunications Assn.  
1900 M Street, NW  
Suite 800  
Washington, DC 20036

Robert J. Aamoth  
Kelley Drye & Warren LLP  
1200 19th Street, NW  
Suite 500  
Washington, DC 20036

Randolph J. May  
Sutherland, Asbill & Brennan  
1275 Pennsylvania Avenue, NW  
Washington, DC 20004

Shelia Jackson Lee  
Congress of the United States  
House of Representatives  
410 Cannon House Office Building  
Washington, DC 20515

Randall B. Lowe  
John E. Benedict  
Piper & Marbury, LLP  
1200 19th Street, NW  
Washington, DC 20036

Edgewood Senior High School Student Council  
2428 Blake Road  
Ashtabula, OH 44004

Jody B. Burton  
GSA  
Office of General Counsel  
Washington, DC 20405

Ward W. Wueste  
Gail L. Polivy  
GTE  
1850 M Street, NW  
Suite 1200  
Washington, DC 20036

R. Michael Senkowski  
R. Paul Margie  
Wiley, Rein & Fielding  
1776 K Street, NW  
Washington, DC 20006

Kathy L. Shobert  
General Communications, Inc.  
901 15th Street, NW  
Suite 900  
Washington, DC 20005

G. Todd Hardy  
Robert E. Jones, III  
Nathaniel J. Hardy  
Hardy & Ellison, PC  
9306 Old Keene Mill Road - Suite 100  
Burke, VA 22015

Ron Dunn  
Information Industry Assn.  
1625 Massachusetts Avenue, NW  
Suite 700  
Washington, DC 20036

Jonathan Jacob Nadler  
Squire, Sanders & Dempsey, LLP  
1201 Pennsylvania Avenue, NW  
P.O. Box 407  
Washington, DC 20044

Christine A. Mailloux  
Blumenfeld & Cohen  
1615 M Street, NW  
Suite 700  
Washington, DC 20036

Leslie A. Harris  
Leslie Harris & Associates  
1146 19th Street, NW  
Seventh Floor  
Washington, DC 20036

Ronald L. Plessner  
Mark J. O'Connor  
Piper & Marbury LLP  
1200 19th Street, NW  
Seventh Floor  
Washington, DC 20036

Mary E. Brooner  
Motorola, Inc.  
1350 I Street, NW  
Suite 400  
Washington, DC 20005

Stephen L. Goodman  
David E. Colton  
Halprin, Temple, Goodman & Sugrue  
1100 New York Avenue, NW  
Suite 650 - East Tower  
Washington, DC 20005

Marlin D. Ard  
Jeffrey B. Thomas  
Pacific Telesis Group  
140 New Montgomery Street - Room 1529  
San Francisco, CA 94105

Colleen Boothby  
Levine, Blaszak, Block & Boothby  
1300 Connecticut Avenue, NW  
Suite 500  
Washington, DC 20036

Daniel J. Weitzner  
Center for Democracy and Technology  
1634 Eye Street, NW  
Suite 1100  
Washington, DC 20036

Joseph S. Paykel  
Andrew Jay Schwartzman  
Gigi B. Sohn  
Media Access Project  
1707 L Street, NW - Suite 400  
Washington, DC 20036

Bradley Stillman  
Don Sussman  
Alan Buacott  
MCI  
1801 Pennsylvania Avenue, NW  
Washington, DC 20006

Daniel L. Brenner  
David L. Nicoll  
NCTA  
1724 Massachusetts Avenue, NW  
Washington, DC 20036

John G. Lamb, Jr.  
Northern Telecom, Inc.  
2100 Lakeside Boulevard  
Richardson, TX 75081

Margaret E. Garber  
Pacific Telesis Group  
1275 Pennsylvania Avenue, NW  
Washington, DC 20004

Scott J. Rubin  
Pennsylvania Internet Service Providers  
Three Lost Creek Drive  
Selinsgrove, PA 17870

David Cosson  
L. Marie Guillory  
NTCA  
2626 Pennsylvania Avenue, NW  
Washington, DC 20037

Diane Iglesias  
SNET  
227 Church Street  
New Haven, CT 06510

David R. Bender  
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Teresa Marrero  
Teleport Communications Group, Inc.  
Two Teleport Drive  
Staten Island, NY 10311

Robert B. McKenna  
U S WEST, Inc.  
1020 19th Street, NW  
Suite 700  
Washington, DC 20036

Margot Smiley Humphrey  
Koteen & Naftalin, LLP  
1150 Connecticut Avenue, NW  
Suite 100  
Washington, DC 20036

Lisa M. Zaina  
Kenneth Johnson  
OPASTCO  
21 Dupont Circle, NW  
Suite 700  
Washington, DC 20036

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One Bell Center - Room 3536  
St. Louis, MO 63101

Leon M. Kestenbaum  
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H. Richard Juhnke  
1850 M Street, NW  
11th Floor  
Washington, DC 20036

Charles C. Hunter  
Catherine M. Hannan  
Hunter Communications Law Group  
1620 Eye Street, NW  
Suite 701  
Washington, DC 20006

Jeffrey L. Sheldon  
Thomas E. Goode  
UTC  
1140 Connecticut Avenue, NW  
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Washington, DC 20036

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1666 K Street, NW - Suite 1100  
Washington, DC 20006

Hal R. Varian  
University of California, Berkeley  
102 South Hall  
Suite 4600  
Berkeley, CA 94720

David N. Porter  
WORLDCOM, Inc.  
1120 Connecticut Avenue, NW  
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Washington, DC 20036

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Richard L. Fruchterman  
Richard S. Whitt  
WORLDCOM, Inc.  
1120 Connecticut Avenue, NW - Suite 400  
Washington, DC 20036

R. Michael Senkowski  
Jeffrey S. Linder  
Gregory J. Vogt  
Wiley, Rein & Fielding  
1776 K Street, NW  
Washington, DC 20006

ITS  
2100 M Street, NW  
Suite 140  
Washington, DC 200